No. 12281

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MRS. LEE BROOKS, also known as MRS. GWENLYN BROOKS,

Appellant,

vs.

TIGHE E. WOODS, Housing Expediter, Office of the Housing Expediter,

Appellee.

APPELLANT'S REPLY BRIEF.

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Further Statement of Facts.

Appellant is filing a motion to have the court inspect certain exhibits which were designated in appellant's "Designation of Parts of Record on Which Appellant Relies and to Be Printed," but which were not included in the printed transcript of record. These exhibits are named in paragraphs 17 and 19. [Tr. p. 56.] They are as follows:

Plaintiff's Exhibit 2A, and also the photostatic enlargement of Plaintiff's Exhibit 2A which is a Registration of the rental dwelling of the apartment occupied by the tenant, Mrs. Harold White. On the back of this exhibit is shown the dates of filing etc., and a notation of the order for lowering the maximum legal rental from the alleged amount of $15.50 per week to $10.00 per week, purporting

to make this amount retroactive from June 5, 1944, although the order is dated June 30, 1947.

This memorandum which is, in effect, the order of the O.P.A., reads as follows:

> "Docket No. 255490 Maximum Legal Rent has been changed from 15.50 to 10.00 per wk. Order dated 6/30/47 Effective ~~first~~ ~~rental~~ ~~period~~ ~~after~~ from June 5, 1944."

This is the order which appellant claims the O.P.A. administrator had no jurisdiction or authority to make (App. Op. Br., Point VI, pp. 18 to 20) by reason of the fact that the regulations printed on page 20 of appellant's opening brief were not followed; and which we claim void, not because of some defect or irregularity in the order, *but because of want of authority or jurisdiction to make it without the required notice to the tenant which the office did not give, and which it must be admitted,* was not followed.

The motion to have the court inspect exhibits also applies to the file in the Municipal Court Action No. 819629 described in paragraph 19 of the designation of parts of the record [Tr. p. 56], not printed in the transcript. This file will show the court the nature of the complaint in the state court action, discussed on this appeal; and shows that the subject matter of the state suit is identical with item for which restitution of over-payment of rent was sought by the expediter for Mrs. White, *and for which judgment was rendered as the main object of this action.*

Further facts will be stated in answer to the points made by appellee in each point to which they relate. For convenience, our point numbers in this reply brief will correspond to the point numbers in appellee's brief.

POINTS I, II, and III.

Answer to Points I, II, and III of Appellee's Brief and Relating to Points I, II, and III of Appellant's Opening Brief.

THE DISTRICT COURT HAD NO JURISDICTION OF THIS CASE.

The cases cited by appellee do not sustain their contention that the state court action did not deprive the District Court of jurisdiction of the same *rem,* to wit: the restitution of the claimed overcharge of the White Rental Unit.

Neither the cases cited by appellee, nor the attempted distinctions between the procedure in a state court action and District Court action in equity answer the law declared by the court in this circuit, in

Gregg v. Winchester (9th Cir.), 173 F. 2d 512.

This applies to the claim for restitution as to the White Tenancy for $797.50 overcharge.

Assuming that the District Court would have jurisdiction over the claim to restitution as to the Woodfaulk Tenancy for $127.00, it is obvious that should this court agree with our contention as to the lack of jurisdiction over the *rem* concerning the White overcharge, there should be a new trial as to the Woodfaulk Claim only, and the case dismissed in so far as it relates the White tenancy.

The arguments of counsel, to which are cited numerous decisions, give us, in our opinion, a distinction *without a*

difference as to the fundamental principles involved. Therefore, we do not answer these arguments in detail. As a matter of common sense, what difference does it make what procedure is used in court to get the identical *rem* for the Tenant White, namely, the $797.50 sought in the first count in the complaint in this action? [Tr. pp. 2-5.] This action is in equity, as appellee concedes; and equity goes to the substance of things, and not the surface. The first count here is for restitution, and there is no denial by appellee that this is the main purpose of this action.

The case of *Butler v. Judge of United States District Court, etc.,* 116 F. 2d 1013, relied upon by appellee [Tr. p. 10] is quoted on a point not sustained by the facts in that case. A question, there involved, was whether the District Court should have stayed proceedings during the pendency of a state suit, and the writ to compel the District Court to proceed to trial was denied. In concluding the court's reasons for so deciding the matter, the court said,

> "The pendency of the action in the State Court was not relied upon by the defendant as a ground of abatement, nor so treated by the Trial Court."

POINT IV.

The Right to Restitution in This Case Expired March 30, 1948 (After the Termination of the 1942 Act on June 30, 1945, and of the 1947 Act on March 30, 1948) Along With the Acts.

This point, discussed in Points III and IV of the Opening Brief, pages 11 and 12, presents a new legal question in the Ninth Circuit so far as we can determine. The question here presented as to the failure of the alleged Savings Clauses in the 1942 and 1947 Acts to save actions pending when these acts expired, is urged as a new proposition by us in this case.

On the expiration of the 1948 Act on March 31, 1949 (Pub. L., 464, 80th Cong.) the acts in question had all expired, assuming that they were all locked together, and were not separate acts, which we do not concede. Therefore, the cases cited in Point III of the Opening Brief, pages 11 and 12, apply unless there is something in the Savings Clause to keep such actions alive. The procedure under the 1949 Act is entirely different.

The new point which we are urging in this appeal is that none of the Savings Clauses relied on by the appellee *apply to actions in equity*. They apply to a "proper suit" to recover or inforce "rights, liabilities or offenses." The Savings Clause in question (see App. p. 37 of Appellee's Br.) does not mention or imply equity actions. We do not see in Point IV of appellee's brief any argument or authority which directly passes upon this point and it is submitted that the case of *Woods v. Richman*,

174 F. 2d 614, does not decide this point as raised on this appeal. The action was filed before the termination of the 1947 Act, namely, in August, 1947. In that case, the court had a different state of facts than are here involved, and the case was sent back to the District Court to consider whether an order of restitution should be made.

Appellee states (p. 23 of his brief) that the case of *Woods v. Gochnour,* 81 Fed. Supp. 457, is now on appeal. We submit that the principles stated by the court in that case quoted in Point VI of the Opening Brief, pages 16 to 18 are sound and should apply in this case notwithstanding the decision in *Woods v. Richman* which fails to pass upon the point urged by us that the savings clause in question (Sec. 1(b) appearing in [50 U. S. C. A., Sec. 901 *et seq.*], page 37 of appendix to Appellee's Brief) does not apply to equity cases.

The other cases cited by appellee, pages 23 and 24 on this point are not controlling here. The facts are different from those in this case.

Ebeling v. Woods, 175 F. 2d 242, was a case in which the action was filed September 26, 1947, while here, the action was filed July 23, 1948. In that case, restitution alone, and not equitable relief was sought.

Woods v. Vendetti, 85 Fed. Supp. 25, 26, appears from the opinion to have been filed before the termination of the Act of 1942.

POINT V.

Answer to Points V and VIII of Appellee's Brief Relative to Equitable Basis for Jurisdiction.

Points V and VIII of Appellee's Brief are in answer to Point VIII of our Opening Brief, pages 21 and 22.

Appellant is relying upon principles rather than analogous cases on the question of whether or not the facts in the case at bar warrant equitable relief.

Assuming that this court holds that the District Court had jurisdiction under the ruling in *Woods v. Richman,* 174 F. 2d 614 (distinguished also by the fact that in it there was no retroactive order) on the theory that it is appropriate for courts to consider whether restitution should be made as a means of giving effect to the general policy of Congress, we submit that under the facts here there is no basis for equitable or injunctive relief.

As pointed out in the Opening Brief, it cannot be questioned that the tenants were not in the property for a considerable period of time before this suit was filed. There was no showing that appellant, as a previous landlord, had rented the property after White and Woodfaulk moved out, and before this action was filed.

Appellee, on page 36 of his brief, says, "nor is there any reason to believe that she (appellant) will not rent again when she finds a suitable tenant. Thus, there was still reason for the court below to anticipate and restrain other related unlawful acts."

This argument is, to us, very foolish. If the Housing Expediter considers this reasoning correct, then he should use his whole force to restrain practically all the landlords who ever over-stepped the O.P.A. laws and showed any tendency to infringe the act. This would require a force many times larger than the existing one at a tremendous expense, to engage in the task of keeping landlords in line in a campaign of useless acts. Such injunctions to use the language of the court in *Woods v. Kooker,* 83 Fed. Supp. 362, 364, would "accomplish no useful purposes." Courts of equity certainly should not be used for foolish purpose, and this simmers down to the bare proposition in this case (which is very far from equitable) that the equitable part of the action was mere pretext to get restitution through the Federal Court when the Expediter knew that the Judge in the state court was ready to deny relief to White on restitution in the Municipal Court Action. [See Tr. p. 39.]

We here urge the fact that the cases cited by appellee in his Points V and VIII are not applicable here. For illustration,

Creedon v. Evangelista, 77 Fed. Supp. 538, was a suit for triple damages and not an equitable suit;

United States v. Pinkston, 85 Fed. Supp. 516, W. D. Ky., was a treble damage case;

Bowles v. Quon, 154 F. 2d 72, was a meat case and not a rent case. Different principles apply in the price cases than to the rent cases.

POINT VI.

Under the Principles Declared in Woods v. Goochnour, 81 Fed. Supp. 457, the Action Was Barred; and This Question Is Affected by the Purported Retroactive Order.

This point is in answer to Point VI of Appellee's Brief, pages 27 to 30, and Point VI of our opening brief, pages 15 to 20, inclusive.

Either the reasoning of the court in *Woods v. Goochnour,* 81 Fed. Supp. 457, quoted in our opening brief is correct or it is not. Appellee says that that case is now on appeal. Regardless of how the appellate court rules in that case, we submit that the same questions are presented here, and should be ruled upon as a necessary determination in this appeal.

Appellee, in our opinion, has failed to show in his brief that the main and real purpose of this suit in the District Court was not to sidestep the state court action, then pending, and use a Court of Equity for that purpose. If equitable principle means anything at all, this should not be done. It is for this reason that it appears to us that the arguments and cases cited under this point are not applicable.

THE ATTACK ON THE RETROACTIVE ORDER IS BASED NOT UPON ITS VALIDITY AS AN ORDER, BUT AN ABSOLUTE WANT OF AUTHORITY TO MAKE IT.

Under the facts set forth on pages 18 to 20, inclusive, of the opening brief, the question presented affects the Expediter's authority, in the first place, to make the order, and not the correctness or validity of the order when made, because of some defect therein. Counsel for the Expediter on the trial and on the motions for a new trial and to dismiss the action insisted that we could not urge the invalidity of the order; and the authorities cited in Point VI, pages 29 and 30 are to this effect. However, appellant then argued to the contrary, and now urges that this was not the question, but rather that the retroactive order (see the quoted order in Statement of Facts herein; Pltf. Ex. 2A made on June 30, 1947, attempting to go clear back to June 5, 1944) was made without any right whatever, for the reason that the Expediter was without authority, without giving the notice under the regulations printed on page 20 of Appellant's Opening Brief (Secs. 1300.207 and 1300.362, Procedural Regulations "3").

In most of the cases cited by appellee throughout his brief, there was no such retroactive order made after the expiration of the 1942 Act and going back to 1944. Therefore, these cases are deemed by us to be not in point under the facts of this case. In this respect, we consider this a case of first impression on appeal. This applies particularly to the cases cited in Point VI of appellee's brief.

POINT VII.

Appellant's Point V That the Complaint Failed to State a Cause of Action Is Well Taken; and This Object May Be Raised at Any Time.

This is an answer to Appellee's Point VII, pages 30 to 34, in answer to our Point V in the Opening Brief, pages 13 and 14. The objection that the complaint is based on one statute "and/or" another statute, *is fundamental as to the statement of a cause of action at all,* and is not a mere uncertainty, which is raised only by a special motion to make the complaint more definite. It does not, within the meaning of Rule 12(e), Federal Rules of Civil Procedure, fail by reason of lack of details, *but because of a fatal defect as a matter of pleading.*

Complaints must always sustain a judgment, which this complaint does not do, for the reasons set out in the Opening Brief.

We respectfully submit that the judgment should be reversed, with costs to appellant.

Respectfully submitted,

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